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Detainees and the Rule of Law

As the new United States Ambassador to Australia, I have been traveling across your remarkable country to introduce myself and to listen to what you have to say about America and our relationship with Australia. I hear a lot about a similar commitment by our two nations to an open, free, and diverse society protected by democratic, representative, and accountable government institutions and by adherence to the rule of law. I also hear a lot about common dangers and threats to the safety and security of our citizens at home and abroad from the scourge of terrorism and its ruthless and indiscriminate targeting of innocent civilians.

As we in America endeavor to preserve the safety and security of our people while maintaining the civil rights and liberties that are central to our national values and aspirations, there are those in the United States who question whether our country has remained faithful to those values and to the rule of law, particularly with respect to the recent legislation relating to the treatment and trial of enemy combatant detainees. That sort of robust debate is healthy for a democracy, and it is one that we Americans obviously relish and encourage in our elective branches of government, in the media, and in the courts. Thoughtful Australians have expressed to me similar concerns about America's commitment to the rule of law, and so I would like to share my views on detainees and military commissions as part of this ongoing dialogue, both here in Australia and abroad.

One central fact in our internal US discussions is undisputed: the terrorist enemy's callous and unconscionable objective to harm American citizens and American interests throughout the globe. Acts of war against the United States by al-Qaida, the Taliban, and associated forces did not begin with the attack on September 11, 2001. In 1993, a terrorist car bomb exploded in the World Trade Center. In 1996, the terrorists issued a fatwa declaring war on the United States. Two years later, Usama bin Ladin called for the murder of US citizens everywhere. He drew no distinction between military and civilian. In August 1998, al-Qaida attacked US Embassies in Kenya and Tanzania, killing 200 and injuring over 5,000. In 2000, an attack on the USS Cole killed 17 US sailors.

These horrific attacks are not limited to Americans and American interests. Terrorist bombings in Bali, Madrid, and London are well known to Australians. Other attacks are perhaps less familiar: in April 2002, an al-Qaida firebombing of a synagogue in Djerba, Tunisia; in November 2002, a car bomb in Mombasssa, killing 15 and wounding 40, and an

attack narrowly missing a 757 taking off from Mombassa for Israel; in 2003, an al-Qaida assault on residential compounds in Saudi Arabia; in that same year, attacks on two synagogues, the HSCB Bank and British consulate in Istanbul, and two attempts to assassinate President Musharraf.

It is also clear that this armed conflict is global in nature and "asymmetrical" in its character. The terrorists are not uniformed members of the armed forces of any sovereign nation state. They act covertly without warning to maximize fear, disruption, and horrendous devastation on the civilian population. These acts of war are often planned in one location and financed in a different nation. Individual operatives may be recruited in a third nation and trained in a fourth. The materials and logistics can come from yet another state, and the actual attack may occur at a site unrelated to any of them.

Acts of war continue to this day. Recently, British and American authorities narrowly thwarted plans to blow up multiple civilian aircraft using liquid explosives. In 2004, bin Ladin endorsed Zarqawi as his emissary in Iraq with the stated goal of inflicting random carnage on coalition forces and the Iraqi people as they work to secure their fledgling democracy. We now read about the resulting violence and suicide attacks against Iraqis and coalition forces alike in the media.

The international community has recognized that the United States was attacked in an act of war and is currently engaged in an armed conflict with al-Qaida, the Taliban, and its associated forces. The UN Security Council explicitly recognized the right of the United States to act in self-defense in response to the September 11th attacks, declaring terrorism a threat to international peace and security. NATO similarly invoked the provisions of collective self-defense in the North Atlantic Treaty, as did Australia in invoking the ANZUS Treaty. The President possesses power under Article II of the Constitution to respond to such acts, and the United State Congress passed its own resolution empowering the President to proceed with military action to protect the American people.

Under both established international law and our own domestic law, the United States is thus empowered to detain captured enemy combatants without trial for the duration of hostilities, just as Australia detained for the duration of the hostilities irregular partisans fighting on behalf of the Japanese during World War II. Such detention is not criminal punishment but is a matter of security, intelligence, and military necessity. Importantly, it prevents the combatant from returning to the conflict. Most recently, Justice Sandra Day O'Connor confirmed in the plurality opinion in *Hamdi v. Rumsfeld* that the detention of enemy combatants for the duration of the particular conflict is a fundamental and accepted incident of war and consistent with US law. Active combat continues, and these ongoing hostilities fully justify the continued detention of dangerous al-Qaida and Taliban detainees at Guantanamo.

The debate over enemy combatant detainees has suffered from a failure to recognize the existence of two different legal structures. All of us are familiar with a civilian, domestic criminal law system which deals with conventional crimes such as assault, fraud, murder, robbery, etc. committed within the geographic boundaries of a particular nation in violation of that nation's domestic laws. When such a domestic crime is committed, the civilian police

investigate, collect physical evidence, identify/locate/interview witnesses, and then appear in court to provide evidence for the prosecution of the accused in a civilian court. Many have erroneously framed the issues relating to enemy combatants in the context of that familiar civilian crime/punishment structure.

The appropriate legal structure for the debate is less familiar, but it has existed in international law for decades in order to deal with the very different circumstances of war and armed conflict. War involves hostile acts by non-citizens, often outside the geographic boundaries of a nation state. The exigencies and chaos of war have long been recognized to require a different legal architecture. The military is the engaged entity, and the resources of the military are devoted in wartime, as they should be, to warfare and military operations. A critical part of those operations is to neutralize the enemy, including where possible the detention of enemy combatants. Given the untraditional nature of the terrorist enemy and the "fog" of war context in which military operations occur, international law and domestic law define the applicable legal system for such detainees to be a military system within appropriate and established parameters, including military commissions to determine responsibility for war crimes.

With respect to the use of military commissions, critics have first questioned the fairness of US military officers determining the guilt or innocence of enemy combatants, asserting that the military commissions will be nothing more than a kangaroo court with a predetermined outcome. They have pointed with considerable flourish to the recent Supreme Court decision in *Hamdan v. Rumsfeld* as a wholesale rejection of this military legal architecture. In actuality, the Court did not reject the use of military commissions but held that Congress needed to authorize military commissions explicitly. The recent legislation passed by the US Congress fully addresses the Court's concerns, and the military commission process will commence shortly.

The new legislation does not establish a kangaroo court. It provides appropriate and detailed rights and procedures for detainees consistent with established international law and with the circumstances and constraints of war. Like the courts-martial process used to try US military personnel, military commissions will utilize experienced military judges who independently decide legal and evidentiary matters. The accused is presumed innocent, enjoys the right to remain silent, and can only be convicted if the government proves guilt beyond a reasonable doubt. The accused has the right to be present throughout the trial, but procedures allow the government to safeguard classified information, sources, and methods. Statements obtained by torture are excluded without exception. Where the procedures differ from civilian rules of evidence, there are sound reasons for it. For instance, the admission of hearsay evidence has for decades been permitted in other international war crimes tribunals (such as those at The Hague) but, in these proceedings, it is admissible only if determined to be reliable.

At the conclusion of the commission proceedings, the detainee has the right of appeal to the independent federal judiciary. The US Government will provide counsel at government expense for the detainee, both before the commission and on appeal. There are, of course, numerous volunteer counsel from American bar groups who will also participate in the representation of those accused of war crimes. Since John Adams' representation of the British soldiers who fired on colonial protesters on the Boston Green, history has shown that

American lawyers take seriously their responsibility to be zealous advocates for controversial clients. Given the split opinions in Supreme Court and the lower appellate courts in these terrorist cases, it is fair to expect the litigation of every possible claim and defense, procedural or factual, that imaginative and talented attorneys can devise.

Critics raise delay as a second objection to the military commissions, and claim that, because "justice delayed is justice denied," the entire military legal system should be abandoned. Another legal maxim asserted just as often by defense counsel provides a different perspective: "Any delay is good for the defense." It puts off the risk of the ultimate decision that the enemy combatant was responsible for a war crime. The critics should remember that the United States has not sought delay. The reason for the delay is the opportunity afforded under the rule of law to challenge before an independent judiciary the very process of adjudication. The enemy combatants have exercised that important right, and the resolution of novel and important issues before the appellate courts does take time. But it is time well invested not only for the particular detainee but also for the American legal system in clarifying a specific body of law in the controversial area of war crimes.

A third concern is the potential for indeterminate detention of enemy combatants without any trial whatsoever. Some argue that the war declared against the United States by the terrorists will never end, and so those detained for the duration of the hostilities will never be released. The United States has not created a "legal black hole" and does not wish to become the world's jailer. It has established procedures to ensure that detainees who are not war criminals are released if they do not pose a danger to the United States or its allies. Each detainee is evaluated by a Combatant Status Review Tribunal (CSRT) to determine whether the designation as an enemy combatant was correct. The detainee is afforded the opportunity to contest the designation. If determined to be an enemy combatant by the CSRT, each such detainee also receives an annual review by an Administrative Review Board to determine whether he still poses a serious risk to the United State or can be released.

These procedures are above and beyond any process required under international law or existing treaties and have resulted in over 300 detainees being released or transferred. Not surprisingly, determining whether a particular individual poses a continuing danger is complicated by conflicting information as well as deliberate denial and deception by trained al-Qaida fighters. Over a dozen of those released have returned to the conflict and been identified after being recaptured or killed in combat. Under such circumstances, one can understand a danger/risk assessment which considers various factors, including attendance at al-Qaida training camps, expertise in explosives and sophisticated military weaponry, statements of intention to harm America and its allies, and acts taken to implement the intention such as traveling from a non-combatant nation into a theater of conflict.

Finally, critics assert that the recent legislation establishes an interrogation policy that allows torture. The United States is unequivocally opposed to torture. We stand firmly by the principle that no circumstance, including war, political instability, public emergency, or order from a superior, justifies torture. For all US personnel in all locations, torture is prohibited. Americans do not condone cruel, inhumane, and degrading treatment in violation of our treaty obligations, and we have not hesitated to prosecute or discipline those who break the law prohibiting it. Since September 11, over 100 US servicemembers have been court-

martialed for alleged detainee abuse, and over 86% have been convicted. Others accused of less serious violations have been disciplined in non-judicial measures including separation from the service. To assist in that ongoing monitoring, the International Committee of the Red Cross meets privately with detainees at Guantanamo. All allegations of abuse are investigated, and the culpable are held accountable.

The United States is a leader in protecting the rights and dignity of all persons, including those of detainees in a time of war. These issues relating to the identification, processing, treatment, and interrogation of military detainees intersect at the very crossroads of individual rights and national security, and, in America, these issues have been, are being, and will continue to be addressed in an ongoing debate before our independent judiciary as they should be in a free, democratic society. It is that pedigree of process with multiple judges passing upon the complex issues of the day in our appellate courts which results in the American people accepting the ultimate decision as the law of the land and complying with it. Rather than abandoning the rule of law, I suggest to you that America is embracing the rule of law in the midst of war as few nations in history have ever done. We Americans certainly do not always agree among ourselves on what the "right" judicial decision should be, but we recognize the legitimacy of whatever the decision may be at the end of the process. It is one of the enduring strengths of our system of government and our people.

Robert D. McCallum, Jr.
Ambassador